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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BADRUDIN KURWA,

Plaintiff and Appellant,

v.

PHYSICIAN ASSOCIATES OF THE
GREATER SAN GABRIEL VALLEY et
al.,

Defendants and Respondents.

B202301

(Los Angeles County
Super. Ct. No. KC045216)

APPEAL from judgments of the Superior Court of Los Angeles County.

Dan Thomas Oki, Judge. Affirmed.

Law Office of Nolan E. Clark and Nolan E. Clark for Plaintiff and Appellant.

Anderson, McPharlin & Conners, Zareh Sinanyan and David T. DiBiase for
Defendant and Respondent Physician Associates of the Greater San Gabriel Valley.

Harrington, Foxx, Dubrow & Canter, Mark W. Flory and Daniel E. Kenney for
Defendants and Respondents Harrington, Foxx, Dubrow & Canter and Dale B. Goldfarb.

Plaintiff Badrudin Kurwa, M.D. ("Dr. Kurwa") brought a shareholder's derivative lawsuit on behalf of Trans Valley Eye Associates, Inc. ("Trans Valley") against Physician Associates of the Greater San Gabriel Valley, a medical corporation ("Physician Associates") alleging breach of a contract to which the latter two corporations were parties. Dr. Kurwa also sued attorney Dale Goldfarb and his law firm, Harrington, Foxx, Dubrow & Canter, LLP (together, "Harrington Foxx"), for tortious interference with contractual relations in connection with the termination of that same contract.

Physician Associates and Harrington Foxx each moved for summary judgment, which the trial court granted based upon its finding that the contract underlying both causes of action was void. Dr. Kurwa appeals the judgments entered against him. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Dr. Kurwa and Mark Kislinger, M.D. ("Dr. Kislinger"), both licensed ophthalmologists, formed Trans Valley in 1992 in order to enter into a capitation agreement (the "Capitation Agreement") with the Huntington Provider Group,¹ a health maintenance organization serving patients in the San Gabriel Valley and environs (the "HMO"). Pursuant to the terms of the Capitation Agreement, Trans Valley agreed to provide to the HMO members ophthalmology care in consideration of the payment of a monthly per capita fee, that is, a fee based on the number of participating members of the HMO. This proved to be a fruitful arrangement: For instance, in the year prior to its termination, the Capitation Agreement resulted in receipts to Trans Valley of approximately \$1.9 million dollars.

¹ Huntington Provider Group later changed its name to Physician Associates of the Greater San Gabriel Valley.

By the latter half of 2003, Dr. Kislinger no longer wished to maintain the status quo.² After consulting with his attorney, defendant Dale B. Goldfarb, the latter wrote a letter on Dr. Kislinger's behalf, addressed to the president of Physician Associates (the "Goldfarb Letter"), which we quote in full:

"This office represents Mark Kislinger, M.D. We are writing to you on his behalf on a matter that involves the continuity of patient care.

"At the present time, there exists a provider agreement between Physician Associates and Trans Valle[y] Eye Associates. As you know, one of the two co-owners of Trans Valley, Dr. Badrudin Kurwa has had his license to practice medicine suspended in the State of California. Pursuant to the agreement between you and that entity, his participation in the provider agreement is automatically terminated. Moreover, we believe the corporate status of Trans Valley is inappropriate for the practice of medicine.

"To solve these problems, we have formed a new appropriate medical corporation for Dr. Kislinger. This new corporation will hire substantially all of the employees and contract physicians of the previous entity, so there will be no interruption of services to patients or any noticeable change to anyone. To facilitate this transfer, we would request that PA transfer its provider agreement from Trans Valley to Mark Kislinger, M.D., Inc. Dr. Kurwa, because of his suspension, will not be a part of the new corporation.

² The record reflects at least three reasons underlying Dr. Kislinger's desire to disassociate from Dr. Kurwa: (1) Dr. Kurwa was subject to a disciplinary proceeding before the California Medical Board in connection with his Medicare billing practices, which investigation ultimately led to a two month suspension from the practice of medicine; (2) Dr. Kurwa was facing civil and criminal proceedings stemming from the alleged sexual battery of two female employees of Trans Valley; and (3) Dr. Kislinger believed that he was not being adequately compensated for the medical services he rendered under the Capitation Agreement.

"We would appreciate having the transfer take place as soon as possible to maintain continuity and quality of patient care, and to avoid any improper entanglement with Dr. Kurwa, whose license is suspended at the present time.

"I would appreciate discussing this matter with you to effectuate this change as smoothly as possible. Your cooperation is appreciated."

In response to this letter, Physician Associates investigated the corporate status of Trans Valley and determined that it was not a medical corporation and was not registered with the California Medical Board. Consequently, it concluded that the Capitation Agreement was defective, since it called for the provision of medical services by an unlicensed, for-profit corporation. Therefore, on October 31, 2003, Physician Associates notified Trans Valley that it was terminating the Capitation Agreement as of November 30, 2003. Subsequently, Physician Associates extended to Trans Valley an opportunity to correct the licensing problem, but Trans Valley did not respond to the offer.

Physician Associates issued a Request for Proposal soliciting a new ophthalmology provider to replace Trans Valley, and thereafter entered into a new capitation agreement with Dr. Kislinger's medical corporation.

Dr. Kurwa brought a derivative lawsuit on behalf of Trans Valley against Physician Associates alleging breach of the Capitation Agreement. Dr. Kurwa also sued Dr. Kislinger, his medical corporation, and his lawyers, Harrington Foxx, for tortious interference with contractual relations.³

Defendants Physician Associates and Harrington Foxx brought separate summary judgment motions, both of which were granted. Dr. Kurwa timely appealed the judgments subsequently entered.

³ Neither Dr. Kislinger nor his medical corporation is a party to this appeal.

DISCUSSION

On appeal, we review a summary judgment motion de novo to determine whether there is a triable issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must show either that the plaintiff cannot establish one or more elements of the cause of action or that there is a complete defense. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.) If the defendant makes this showing, the burden shifts to the plaintiff to show a triable issue of fact as to that cause of action or defense. (Code Civ. Proc., § 437c, subd. (p)(2).) We view the evidence in the light most favorable to the plaintiff as the losing party, liberally construing his evidentiary submissions, strictly scrutinizing defendants' evidence and resolving any evidentiary doubts or ambiguities in plaintiff's favor. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.)

The trial court ruled that Physician Associates had shown in its summary judgment motion and supporting papers that Dr. Kurwa, on behalf of Trans Valley, could not establish one of more elements of his single cause of action against Physician Associates for breach of contract. As the trial court explained in its tentative decision, "To establish a claim for breach of contract, the plaintiff must demonstrate (1) the existence of a contract, (2) plaintiff's performance or excuse for non-performance, (3) defendant's breach, and (4) resulting damage to plaintiff. (See, e.g., *Lortz v. Connell* (1969) 273 Cal.App.2d 286, 290.) Regarding the existence of a contract, the element has its own additional requirements. The plaintiff must demonstrate (A) parties capable of contracting, (B) their consent, (C) a lawful object, and (D) sufficient cause or consideration. (Civ. Code, § 1550; *O'Byrne v. Santa Monica-UCLA Medical Center* (2001) 94 Cal.App.4th 797, 806-807.) If there are no parties capable of contracting, or there is no lawful object, or there is no genuine breach by [Physician Associates], then no triable issues of material fact exist as to the plaintiff's 1st and 2nd causes of action and summary judgment is appropriate."

A statutory ban on the corporate practice of medicine is contained in Business and Professions Code section 2400. An exception to the ban applies to medical corporations in compliance with the Moscone-Knox Professional Corporation Act (Corp. Code, § 13400 et seq.) Trans Valley was not a medical corporation in compliance with the Moscone-Knox Professional Corporation Act. It therefore could not legally practice medicine in California.

The trial court found that Trans Valley was not capable of entering into the Capitation Agreement, since that agreement called for the provision of medical services, and Trans Valley was neither a medical corporation nor licensed with the California Medical Board. For those same reasons, the Capitation Agreement was contrary to the policy of the law as expressed in the above-cited statutes.

Dr. Kurwa argues that, notwithstanding the express provisions of the Capitation Agreement, in performing its obligations under that agreement, Trans Valley did not in fact engage in the practice of medicine. He further maintains that, because Trans Valley was owned by licensed physicians, the evil to be remedied by the ban on the corporate practice of medicine was not present in this case. Dr. Kurwa cites in support of this argument "permissive language about nonprofit medical corporations from cases predating the Knox-Keene Act when courts struggled to accommodate group health plans with the ban on the corporate practice of medicine." (*California Physicians' Service v. Aoki Diabetes Research Institute* (2008) 163 Cal.App.4th 1506, 1515.) Specifically, Dr. Kurwa maintains that one of those earlier cases, *Complete Service Bureau v. San Diego Medical Society* (1954) 43 Cal.2d 201, provides dispositive authority for his position. However, as the appellate court noted in *California Physicians' Service v. Aoki Diabetes Research Institute, supra*, these cases "suggest nothing more than a narrow exception to the ban on the corporate practice of medicine for nonprofit MCOs now regulated by the Knox-Keene Act." (*California Physicians' Service v. Aoki Diabetes Research Institute, supra*, at p. 1516.)

California Physicians' Service v. Aoki Diabetes Research Institute concerns the issue of the corporate practice of medicine through licensed health providers subsequent

to the enactment of the Knox-Keene Act. In that case, the plaintiff, California Physicians' Service doing business as Blue Shield ("Blue Shield"), like Physician Associates here, entered into provider agreements with health care professionals to provide medical services to its enrollees. The defendant, Aoki Diabetes Research Institute ("ADRI") was a health care provider organized as a nonprofit corporation. Blue Shield sued ADRI for declaratory relief in connection with certain medical services provided by ADRI to Blue Shield enrollees which the latter contended were experimental and thus not covered. Blue Shield argued that the provider agreement between Blue Shield and ADRI was illegal because ADRI was organized as a nonprofit corporation and not a professional medical corporation. The trial court concluded, among other things, that the ban on the corporate practice of medicine did not apply because "the contract does not contemplate that ADRI itself would provide medical services, but rather medical services would be provided by physicians and other health providers within the scope of the license[s] as indicated by the terms of the contract" (*id.* at p. 1513), and entered judgment for ADRI.

While the Court of Appeal affirmed the judgment in favor of the health care provider, it found that ADRI had indeed "violated the statutory ban on the corporate practice of medicine." (163 Cal.App.4th at p. 1516.) ADRI argued, as Dr. Kurwa argues here, that the perils associated with the corporate practice of medicine did not apply, since ADRI was a nonprofit corporation, and only licensed professionals rendered medical services under the provider agreement with Blue Cross. The appellate court was not persuaded: "It is true, as the trial court found, that 'the contract does not contemplate that ADRI itself would provide medical services, but rather medical services would be provided by physicians and other health providers within the scope of the license[s] as indicated by the terms of the contract.' But the fact remains that the contract was expressly between Blue Shield and ADRI, a corporate entity. It was ADRI that agreed to render professional services. Of course ADRI itself would not provide medical services – it is a corporation, an artificial entity, that necessarily acts through the agency of natural persons. [Citation.] This fact does not convert the contract into one between Blue Shield and the corporate actors." (*Id.* at p. 1515.)

In sum, *California Physicians' Service* makes clear that neither a not-for-profit corporation such as ADRI, nor a for-profit corporation such as Trans Valley, may enter into provider agreements with managed care organizations. Because the Capitation Agreement was illegal, Dr. Kurwa could not maintain an action for breach of contract against Physician Associates.⁴ Consequently, the trial court properly entered summary judgment in favor of Physician Associates.

Similarly, as Dr. Kurwa acknowledged during the hearing on Harrington Foxx's motion for summary judgment, if the Capitation Agreement was void, Harrington Foxx could not be liable to Trans Valley for tortious interference with that contract. Thus, judgment in favor of Harrington Foxx was proper.

DISPOSITION

The judgments are affirmed.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.

⁴ Unlike the situation in *California Physicians' Service*, there are no equitable concerns in this case which would permit an exception to the rule that "a contract made in violation of a regulatory statute is void." (*Id.* at p. 1516, quoting *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 435.)